Hwa Chea Lin & Anor v Malim Jaya (Melaka) Sdn Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–49–1988
SURIYADI J
19 JANUARY 1996

Contract *— Sale and purchase of land — Fundamental breach of contract — Building was delivered with serious defects — Whether breach went to root of contract — Whether implied warranty existed that house was to be built in an efficient and workmanlike manner — Whether defect liability period clause excludes fundamental breach*

Contract *— Rescission — Sale and purchase of land — Whether rescission valid — Whether unilateral act of plaintiffs to terminate contract sufficient and in accordance with requirements of the law — Whether plaintiffs acquiesced to contract — Whether defendant rebuilding the house without plaintiffs' consent supported rescission*

On 11 September 1984, the plaintiffs entered into an agreement with the developer ('the defendant') for the purchase of a single-storey terrace house ('the building') for the purchase price of RM62,950. A notice dated 3 June 1986 was sent to the plaintiffs by the defendant to take delivery of vacant possession of the building. In 1987, the plaintiffs orally complained to the defendant regarding the defects found in the building. Remedial works were done but in an unsatisfactory manner. Upon further complaint by the plaintiffs, further remedial works were carried out in 1988. The plaintiffs were still dissatisfied with the repairs and complained vide a letter dated 4 April 1988. On 28 May 1988, the plaintiffs through their solicitors sent a letter rescinding the agreement. On 18 November 1988, the plaintiffs filed the present action. The plaintiffs alleged there was a fundamental breach of the agreement as the house they received on 3 June 1986 was not what they had bargained for and therefore the rescission was correct in law. They prayed for the refund of all the monies already paid together with interest and certain other reliefs. The defendant argued that they had carried out the construction of the building in a manner as specified in the second schedule to the agreement and that the plaintiffs had acquiesced to the contract. Aside from that, there was no evidence to suggest that the requirements of s 40 of the Contracts Act 1950 ('the Act') had been fulfilled and the defendant claimed that the rescission was bad and that the contract was still good. The court had to consider whether (a) the defective liability period clause, which was only valid for a year, was relevant in this case; (b) whether a fundamental breach existed to justify rescission by the plaintiffs; and (c) whether the letter of rescission dated 28 May 1988 constituted a good rescission.

Held, allowing the plaintiffs' claim and ordering a refund of the purchase price paid:

(1) From the evidence adduced, a fundamental breach had occurred as the building that was delivered to the plaintiffs in 1986 was

not what they had bargained for. The evidence adduced clearly showed that the said building when delivered to the plaintiffs was in a terrible shape that required massive remedial works and eventually had to be rebuilt. Since what was delivered was not what had been agreed upon, the breach was a breach that went to the root of the contract. In a contract with builders for the purchase of a house to be erected there is an implied warranty by the vendors that the house would be built in an efficient and workmanlike manner, and with proper materials and fit for habitation (see p 552B–H; *Hancock & Ors v Brazier (BW) (Anerley) Ltd* [1966] 2 All ER 901, *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113 and *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 followed).

(2) On a plain interpretation, the defect liability period clause merely laid down the responsibility of the vendor over minor defects within one year of the delivery of vacant possession. The defect liability period provision was silent as to the ousting of fundamental breaches. Therefore, it was not relevant here (see p 553C–D).

(3) After considering all the evidence and the subsequent actions of the defendant, an effective rescission had been proved by the plaintiffs and the defendant had also accepted the repudiation of the contract. In any event, the unilateral act of the plaintiffs to terminate the agreement was sufficient and in accordance with the requirements of the law. The subsequent activity of the defendant in rebuilding the houses including the said building without securing any prior permission from the plaintiffs supported the plaintiff's assertion (see pp 554I, 555A–B; *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 distinguished).

(4) The consequential effect of delivering a defective house unfit for human habitation and unsafe was that the defendant had also breached cl 7 of the agreement. Clause 7 clearly provided that time shall be of the essence of the agreement (see p 555B–C).

[Bahasa Malaysia summary

Pada 11 September 1984, plaintif telah mengikat suatu perjanjian dengan pemaju ('defendan') untuk pembelian sebuah rumah teres satu tingkat ('bangunan itu') dengan harga belian sebanyak RM62,950. Satu notis bertarikh 3 Jun 1986 telah dihantar kepada plaintif oleh defendan untuk mengambil milikan kosong bangunan itu. Dalam tahun 1987, plaintif telah membuat satu aduan secara lisan kepada defendan mengenai kecacatan yang dijumpai dalam bangunan itu. Kerja-kerja pembaikan telah dibuat tetapi dalam cara yang tidak memuaskan. Setelah aduan tambahan dibuat oleh plaintif, kerja-kerja pembaikan yang selanjutnya dilakukan dalam tahun 1988. Plaintif masih lagi kurang berpuas hati dengan kerja-kerja pembaikan itu dan mengadu melalui suatu surat bertarikh 4 April 1988. Pada 28 Mei 1988, plaintif melalui peguam mereka telah membatalkan

perjanjian itu. Pada 18 November 1988, plaintif memfailkan tindakan ini. Plaintif mengatakan bahawa terdapat suatu kemungkiran asasi perjanjian itu kerana rumah yang diterima oleh mereka pada 3 Jun 1986 bukanlah apa yang telah dipersetujui dan oleh itu pembatalan itu adalah sah dari segi undang-undang. Mereka memohon untuk pengembalian kesemua wang yang telah dibayar bersama bunga dan beberapa relief tertentu yang lain. Defendan menghujah bahawa mereka telah menjalankan pembinaan bangunan itu mengikut cara yang ditetapkan di dalam jadual kedua kepada perjanjian itu dan bahawa plaintif telah memberi akuiesens kepada kontrak itu. Selain daripada itu, tidak terdapat keterangan yang boleh menunjukkan bahawa keperluan s 40 Akta Kontrak 1950 ('Akta itu') telah dipenuhi dan defendan menuntut bahawa pembatalan itu tidak sah dan kontrak itu masih boleh dikuatkuasakan. Mahkamah mesti memutuskan (a) sama ada klausa tempoh liabiliti kecacatan, yang hanya sah untuk satu tahun, adalah relevan di dalam kes ini; (b) sama ada kemungkiran asasi wujud untuk menjustifikasikan pembatalan oleh plaintif; dan (c) sama ada surat pembatalan bertarikh 28 Mei 1988 merupakan pembatalan yang sah.

Diputuskan, membenarkan tuntutan plaintif itu dan memerintahkan pengembalian harga belian yang telah dibayar:

(1) Dari keterangan yang dikemukakan, suatu kemungkiran asasi telah berlaku kerana bangunan yang disampaikan kepada plaintif dalam tahun 1986 bukanlah apa yang telah dipersetujui. Keterangan yang dikemukakan jelas menunjukkan bahawa bangunan itu semasa disampaikan kepada plaintif berada dalam keadaan yang buruk yang memerlukan kerja pembaikan besar-besaran dan akhirnya terpaksa dibina semula. Oleh kerana apa yang disampaikan bukannya apa yang dipersetujui, kemungkiran itu adalah kemungkiran yang membawa kesan kepada punca kontrak itu. Dalam kontrak dengan pembina untuk pembelian rumah yang akan dibina terdapat waranti yang tersirat oleh penjual rumah itu bahawa rumah itu akan dibina dengan efisien dan cekap, dan dengan menggunakan bahan yang betul dan adalah sesuai untuk didiami (lihat ms 552B–H; *Hancock & Ors v Brazier (BW) (Anerley) Ltd* [1966] 2 All ER 901, *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113 dan *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 diikut).

(2) Mengikut tafsiran yang biasa, klausa tempoh liabiliti kecacatan hanya menyatakan tanggungjawab penjual ke atas kecacatan yang kecil dalam tempoh satu tahun dari tarikh pemberian milikan kosong. Peruntukan tempoh liabiliti kecacatan itu senyap mengenai penyingkiran kemungkiran asasi. Maka, ia tidak relevan di sini (lihat ms 553C–D).

(3) Setelah mempertimbangkan kesemua keterangan dan tindakan-tindakan seterusnya oleh defendan, suatu pembatalan yang berkesan telah dibuktikan oleh plaintif dan defendan juga telah

menerima pembatalan kontrak itu. Walau apa sekalipun, tindakan satu pihak oleh plaintif untuk membatalkan perjanjian itu adalah cukup dan mengikut keperluan undang-undang. Perbuatan defendan seterusnya dalam membina semula bangunan itu tanpa mendapatkan sebarang kebenaran daripada plaintif sebelum itu hanya menyokong penegasan plaintif (lihat ms 554I, 555A–B; *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 dibezakan).

(4) Akibat sampingan dalam menyampaikan rumah yang rosak dan tidak boleh didiami oleh manusia dan tidak selamat adalah bahawa defendan telah memungkiri klausa 7 perjanjian itu. Klausa 7 jelasnya menunjukkan bahawa masa adalah intipati perjanjian itu (lihat ms 555B–C).]

[*Editorial Note*: The defendant has applied for leave to appeal to the Court of Appeal.]

Notes

For cases on breach of building contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1252–1268.

For a case on recession of building contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2020.

Cases referred to

Choo Yin Loo v Visuvalingam Pillay (1930) 7 FMSLR 135

Chua Ngah Chin v Ng Kie En [1986] 1 MLJ 267

Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308

George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 1 All ER 108

Hancock & Ors v Brazier (BW) (Anerley) Ltd [1966] 2 All ER 901

Harbutts 'Plasticine' Ltd v Wayne Tank and Pump Co Ltd [1970] 1 QB 447

Miller v Cannon Hill Estates Ltd [1931] 2 KB 113

Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151

Suisse Atlantique Societe D'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361

Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors [1995] 2 MLJ 663

UGS Finance Ltd v National Mortgage Bank of Greece and National Bank of Greece [1964] 1 Lloyd's Rep 446

Legislation referred to

Contracts Act 1950 ss 40, 47

Housing Developers (Control and Licensing) Act 1966

Lai Kuan Jean (*KS Das & Co*) for the plaintiffs.

H D'Cruz (*Nik Hussain & Partners*) for the defendant.

Cur Adv Vult

Suriyadi J: On 11 September 1984, the plaintiffs entered into an agreement with the developer (the 'defendant') for the purchase of a single-storey terrace house identified as No 126, Jalan Zahir 18, Taman Malim Jaya, Jalan Malim, 75250 Melaka ('the said building') on Lot PT No 1279, HS (M) 1015/82, Mukim Bacang, District of Melaka Tengah, Melaka. The purchase price was RM62,950 only. Under cl 18 (B1–11), the said building was to be completed by the vendor and vacant possession delivered to the purchasers within 24 calendar months from the date of the agreement. The defendant later served a notice dated 3 June 1986 (B79) to the plaintiffs to take delivery of vacant possession even though the supposed delivery date was 7 September 1986. The plaintiffs, sometime in 1987, orally complained to the defendant as to the defects found in the building. Remedial works were done in the same year albeit unsatisfactorily. The plaintiffs undeterred further complained to one Mr Ng, who was the manager of the defendant, and was assured that further repairs would be carried out after the Chinese New Year in 1988. The defendant kept their words but the plaintiffs were still dissatisfied with the repairs done. Unhappy with the situation, the first plaintiff complained vide letter dated 4 April 1988 (B83). From the evidence, it was adduced that the plaintiffs subsequently employed certain experts, amongst them an engineer who visited the site in 1988 who later prepared the relevant report in September 1988 and an architect. On 28 May 1988, the plaintiffs through their solicitors sent P1, ie a letter rescinding the contract. On 18 November 1988, the plaintiffs filed this action. Evidentially it is not disputed that the defendant literally tore down four rows of houses including the said building sometime in February 1990 and completed the rebuilding at the end of 1991.

The plaintiffs alleged in para 7 of the statement of claim that there was a fundamental breach of the agreement as the house they received on 3 June 1986 was not what they had bargained for and therefore the rescission was correct in law. The plaintiffs, therefore, prayed for the refund of all the monies already paid inclusive of interest and certain other reliefs.

The defendant in the statement of defence asserted that at all material times the defendant had carried out the construction of the said single-terrace house in a good and workmanlike manner and in accordance with the specifications described in the second schedule to the said agreement. The defendant also alleged that the plaintiffs could not have rescinded the agreement as they had acquiesced to the contract. Aside from that, there was no evidence of the requirements of s 40 of the Contracts Act 1950 ('the Act') being fulfilled, namely that the defendant had refused or was incapable of fulfilling the contract. In para 5 of the amended statement of defence and counterclaim, the defendant had averred that the massive cracks, foundation faults, sinking and other major structural defects alleged by the plaintiffs were beyond the control of the defendant as the defects complained of were entirely that of the act of nature but no evidence was adduced to support this contention. In fact, the defendant had persisted

on the defence that the rescission was bad and that the contract was still good.

To support the plaintiffs' case four witnesses were called, namely PW1 the first plaintiff himself, PW2 an architect, PW3 a neighbour of the plaintiffs who was in the same predicament as the plaintiffs and PW4 an engineer. PW1 in his evidence admitted that on 3 June 1986 he received B79, a notice requesting him to take vacant possession. He did not take the keys as the house was in an unsatisfactory state. He subsequently informed Mr Ng of the state of the house and he in return promised that remedial works would be done later. The remedial works were completed in 1987 but were still not up to the mark and PW1 lodged a similar complaint. Repairs were again undertaken after the Chinese New Year in 1988 but with the same negative results. Bitter with the situation, he voiced out his unhappiness vide a letter dated 4 April 1988 (B83) which contained among others his complaints regarding cracks, sinking and other defects in the house. He asserted that the defects were major defects involving the structure and foundation of the building. Aside from recording his extreme dissatisfaction in the manner in which the house was constructed, he ventilated his fears of his personal safety, hence causing him not to be able to occupy the house. PW1 also said before his lawyer's rescission letter was forwarded to the defendant he did request from Mr Ng a new house as a replacement. He also gave evidence that a few years later the said building was literally torn down and rebuilt.

PW2, an architect by profession who investigated into the condition of the said building, evinced that he saw first hand on 9 August 1988 that the ground on which the building was built had sunk at different parts. The substantial differential settlement on the land led to the cracks and tear of the building. He concluded that the construction was no longer safe for habitation and therefore required a major repair to be undertaken. PW4, a qualified engineer on instruction of PW1, inspected the said building on 31 January 1988. He too found many sink holes when the repairmen hacked the concrete leaving a void wherever the earth had subsided. In fact, he found that the ground floor slabs had not followed the British Code of Practice emulated by the Malaysian practices as the ground floor slab was a mere 1½in and not 4in. The cement content was low and piling had not been properly carried out. He similarly concluded that overall the workmanship was poor and the house was unsafe to stay in.

PW3, who is the neighbour of PW1, was one of the purchasers of the lot of houses built by the defendant. His house is immediately to the right of PW1's house as one faces away from the row of buildings. He moved in into his unit in September 1987 but moved out in February 1990 when the house was dismantled. He confirmed that the plaintiffs' house too was rebuilt and completed at the end of 1991.

Aside from the evidence adduced from these witnesses, photographs were tendered which lucidly highlighted the poor condition of the relevant building. The pictures spoke for themselves. Besides highlighting the serious defects, they confirmed the subsequent actions of the defendant

after 1990 when the defendant literally tore down and rebuilt the building. The defendant in their submission admitted of the literal rebuilding but justified the necessity of the dismantling of the walls and the roof in order to redress the foundation and the structure of the building.

The relevant questions begging to be considered by the court, inter alia, would be:

(1) whether cl 23 which provided for a defect liability period is relevant in this case;

(2) whether there was a fundamental breach which justified a rescission on the part of the plaintiff; and

(3) whether there was a good rescission when the plaintiffs through his lawyer sent the letter of rescission on 28 May 1988 (P1).

To have a better understanding of the above problems and before disseminating in detail the legal intricacies involved, perhaps it would not be inappropriate to touch briefly on the contention of the defence. The defendant submitted that since vacant possession had taken place on 3 June 1986 and a year had passed, the plaintiffs could not now invoke cl 23. This clause provided a mere one year for the defect liability period. Further, the plaintiffs could not have rescinded the contract as there was no evidence that the defendant had refused or was unable to perform the contract what with the conduct and attitude of the plaintiffs before or after 28 May 1988 showing acquiescence to contract.

The plaintiffs have asserted that they had rescinded the contract on the solitary ground of fundamental breach on the part of the defendant. To fully understand the plaintiffs' stance perhaps it would be better if I discuss the expression of 'fundamental breach of contract' briefly. 1 *Chitty on Contracts* (24th Ed) at p 367 elucidated:

> The expression 'fundamental breach of contract' is used in two quite different senses. In one sense, it denotes a breach by one party which is sufficiently serious to entitle the other party, not merely to claim damages, but to elect to treat himself as discharged from further performance under the contract ... In another sense, however, fundamental breach expresses a supposed principle of law that there are certain breaches of contract which are so totally destructive of the obligations of the party in default that liability for such a breach cannot be limited or excluded by means of an exemption clause.

In *Suisse Atlantique Societe D'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, the House of Lords held that even though there was a breach that went to the root of the contract but as they had affirmed the contract 'they cannot escape from the consequences of the demurrage clause, unless as a matter of construction, they can show that it has no application to the events of this case' (per Lord Upjohn). Therefore, if the innocent party had elected to affirm the contract he would thus be bound by the terms of the contract including the exemption clause. If the innocent party had elected to treat the breach as discharging himself from further performance of the contract 'the whole contract has ceased to exist including the exclusion clause, and I do not see how that

clause can be used to exclude action for loss which was suffered by the innocent party after it has ceased to exist ...' (per Lord Reid at p 398B; see also *Chua Ngah Chin v Ng Kie En* [1968] 1 MLJ 267).

Pearson LJ on this point in *UGS Finance Ltd v National Mortgage Bank Of Greece and National Bank of Greece* [1964] 1 Lloyd's Rep 446 at p 450 had this to say:

> As to the question of 'fundamental breach,' I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the contract ... This is ... a rule of construction based on the presumed intention of the contracting parties ... This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exception clauses drawn in extravagantly wide terms, which would produce absurd results if applied literally.

In *George Mitchell v Finney Lock Seeds* [1983] 1 All ER 108, the court too was of the view that exclusion clauses which purported to exclude all liability were to be construed more narrowly than those which sought to limit liability.

In another landmark case but many years earlier, the court in *Harbutts 'Plasticine' Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 affirmed that where a fundamental breach occurred and further performance of the contract was impossible and the plaintiff had no option but to treat the contract as at an end, the defendant was precluded from relying on the exemption clause limiting his liability.

In Malaysia, the terminology of fundamental breach, which is a concept of the common law, though not in exact term terms has become a creature of statute (see *Choo Yin Loo v Visuvalingam Pillay* (1930) 7 FMSLR 135). The relevant provision which is now enshrined in s 40 of the Act reads:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct his acquiescence, in its continuance.

For the innocent party to rescind, two situations must prevail, namely that the offending party had refused to perform or disabled himself from performing his promise. (The relevant contract as indicated by para 3 of the statement of claim comes under the Housing Developers (Control and Licensing) Act 1966.) The defendant's counsel had consistently argued that there was absolutely no evidence that the defendant had refused or had disabled itself from performing its promise. On the contrary, the defendant was not only willing but was in the process of fulfilling its obligation as provided by s 47 of the Act. The defendant further submitted that the plaintiffs by conduct or words had acquiesced in the continuance of the agreement. This point will be discussed in detail later. Now is the right time to decide whether a fundamental breach or a non-performance of the contract as envisaged by s 40 of the Act had occurred which entitled the plaintiffs to rescind. (Henceforth, I shall maintain the terminology of

'fundamental breach' since I am fully satisfied that the provision of s 40 is the direct descendant of the common law concept.) Further, even if the court is satisfied that a fundamental breach had occurred the further question to be answered is whether the plaintiffs had elected to discharge the contract or had acquiesced to the contract. From the evidence adduced, I must conclude that a fundamental breach had occurred as the building that was delivered to them in 1986 was not what they had bargained for (see *Pollock & Mulla on Indian Contract and Specific Relief Acts* at p 397). On perusal of the sale and purchase agreement dated 11 September 1984 (B1-B11), the vendor agreed to sell the plaintiffs a single-storey terrace house with the details provided in the second and third schedules. The evidence adduced during the hearing clearly showed that the said building when delivered to the plaintiffs was in a terrible shape that required massive remedial works and eventually had to be rebuilt. Since what was delivered was not what had been agreed upon surely the breach was a breach that went to the root of the contract. I also find solace in the writings of *Cheshire and Fifoot's Law of Contract* (8th Ed) at p 566 which reads:

> Of what nature, then, must a breach be before it is to be called 'fundamental?' There are two alternative tests that may provide the answer. The court may find the decisive element either in the importance that the parties would seem to have attached to the term which has been broken or to the seriousness of the consequences that have in fact resulted from the breach. We have already suggested that the former is the happier approach to the matter ...
>
> According to this test, the governing principle is that everything depends upon the construction of the contract in question. The court has to decide whether, at the time when the contract was made, the parties must be taken to have regarded the promise which has been violated as of major or of minor importance. In the words of Bowen LJ:
>
> > 'There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.'

Since the plaintiffs did not get delivery of a house in the accepted sense clearly a fundamental breach had occurred. Case law too has clearly come to the forefront to affirm that in a contract with builders for the purchase of a house to be erected there is an implied warranty by the vendors that the house would be built in an efficient and workmanlike manner, and with proper materials and fit for habitation (see *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113; *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663; *Hancock & Ors v Brazier (BW) (Anerley) Ltd* [1966] 2 All ER 901).

I now come to another related issue, namely whether on a proper construction of cl 23 this defect liability period clause did exclude a fundamental breach. Clause 23 reads:

> 23 Any defect, shrinkage or other faults in the building which shall become apparent within a period of 12 calendar months after the date of delivery

> of vacant possession to the purchaser and which are due to defective workmanship or materials or the said building not having been constructed in accordance with the said specifications and plans as approved by the appropriate authority (amended or unamended as the case may be) shall be repaired and made good by the vendor at his own cost and expense within one month of its having received written notice thereof from the purchaser and if the said defects, shrinkage or other faults in the said building have not been made good by the vendor, the purchaser shall be entitled to recover from the vendor the costs of making good the same and the purchaser may deduct such costs from any sum which has been held by the vendor's solicitor as stakeholder for the vendor.

Having perused this clause on a plain interpretation, it merely laid down the responsibility of the vendor over minor defects within one year of the delivery of vacant possession and of his subsequent liability were there to be discovered new ones. Definitely this defect liability period provision is silent as to the ousting of fundamental breaches. To use the words under para 3 of the headnote in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 1 All ER 108:

> Those breaches could not have occurred without negligence on the part of the defendants. Accordingly (Lord Denning MR dissenting), on its true construction the limitation clause did not exempt the defendants from liability because there was nothing in it which protected them from the consequences of their own negligence and (per Oliver LJ) because what was delivered was wholly different in kind from that which the plaintiffs had ordered.

The fact that the defendant, sometime in 1990, rebuilt the building lends credence to the court's findings that what was delivered to the plaintiffs in 1986 was not the unit of property agreed and expected by the latter. Had the building been built in line with all the required specifications and in accordance with all legal requirements surely the building would not have been torn down and rebuilt.

The next relevant point that is to be considered is whether after having realized that a fundamental breach had occurred whether the plaintiffs had acquiesced to the continuance of the contract or had elected to rescind it. If the rescission was good in law then they had extricated themselves from the agreement consequenting in the termination of the contract. Several events were highlighted by the defendant to prop up the argument that the plaintiffs had acquiesced in the continuance of the contract, viz:

(i) the charge and loan documents executed in 1986 (B12-24);

(ii) legal fees paid in August/September 1986 (B28);

(iii) after having taken vacant possession in June 1986 the plaintiff had visited one Mr Ng, a representative of the defendant's company, requesting that remedial works be carried out. In fact, in 1987, PW1 again asked for a second remedial works be carried out. He was promised that further remedial works would be carried out after the 1988 Chinese New Year;

(iv) the employment of an architect in April 1988;

(v) the preliminary reports prepared by PW4 in September 1988 and photos taken in April 1988;

(vi) photographs taken in February, June and December 1990 (B111–134); A

(vii) a loan taken by the plaintiffs from 7 October 1986 all the way up to 13 October 1993;

(viii) payments of quit rents from 1987 to 1991 (B29/B31);

(ix) assessments paid by the plaintiffs from July 1988 until January 1992 (B32/B34); and B

(x) PW1's continual reference to the house as his house and his acceptance of the house as his.

The sum total of these factors, the defendant submitted, would lead to the irresistible conclusion that the plaintiffs wanted the defendant to rectify the defects as indicated by their conduct especially the continued monitoring of the repairs, visits to the scene, taking of photographs and employing of experts. The defendant's counsel submitted that surely, all these factors support the contention that the plaintiffs had acquiesced to the continuance of this contract. If the court were to agree with the issue of the acquiescence, the dicta of Salleh Abbas FJ (as he then was) in *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 would be relevant especially at p 153 para G–H left which reads: C D

> By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing. E

It would appear in the current case, which is at variance with *Sim Chio Huat,* that the plaintiffs had elected to treat themselves as discharged from further performance of the contract as they had sent a letter of rescission on 28 May 1988. The plaintiffs, on the other hand, were not reluctant to admit that they had acquiesced up to 28 May 1988 but not thereafter. Post 28 May 1988, the plaintiffs showed no further interest in the said building. The fact that the plaintiffs did not join the other seven purchasers to demand that the developers carry out remedial works held testimony to his lack of interest. It was not disputed that the plaintiffs had not occupied nor taken the keys to the house. The subsequent photographs taken in 1990 were merely to support the legal action when this present suit was filed on 18 November 1988. The plaintiffs' counsel too gave reasonable answers as to why payments had to be continued whether in the form of quit rents, assessments or the monthly instalments as these were legal and contractual payments to third parties. Aside from these factors which were justified by the plaintiffs, the court was affected by these nagging questions namely: F G H

(i) did the defendant accept the rescission? and

(ii) if the rescission was not accepted why did the defendant rebuild the relevant premises without obtaining prior permission from the plaintiffs? I

After considering all the evidence and the subsequent actions of the defendant, I was satisfied that an effective rescission had been proved by the plaintiffs and that the defendant had also accepted the repudiation of

A the contract. Notwithstanding this factor of acceptance by the defendant, I was satisfied too that the unilateral act of the plaintiffs to terminate the agreement was sufficient and in accordance with the requirements of the law. The subsequent activity of the defendant to literally rebuild the four rows of houses including the said building without securing any prior B permission from the plaintiffs merely supported the correctness of the plaintiffs' assertion.

The consequential effect of delivering a defective house unfit for human habitation and unsafe, the defendant thus too, had breached cl 7 of the agreement. Clause 7 clearly provided that 'time shall be the essence of the contract' in relation to all the provisions of the agreement.

C

Perhaps it is quite timely to refer to the case of *Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308 at p 309 para C–D as regards damages where Abdul Malek J (as he then was) said:

> Now, it is pertinent to examine the law on this point. In *Mayson v Clouet & Anor* [1924] AC 980, Lord Dunedin had said 'the law is quite plain. If one D party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end, that is, no longer binding on him — while retaining the right to sue for damages in respect of the breach committed.'

E As it was in this case, the plaintiffs did not treat the contract as subsisting entitling him the right to sue for damages in respect of the breach but to completely repudiate the contract. For some reason or other, the plaintiffs did not succeed in proving certain relevant claims such as the differences in expenses for buying a new house. On the other hand, I was satisfied that the plaintiffs did prove to the satisfaction of the court the following prayers F which had to be refunded by the defendant, viz:

(1) the purchase price of RM62,950 as illustrated in the sales and purchase agreement (B1–B11) paid through a RM50,000 loan and the balance from his own savings (B50);

G (2) interest on loan at 10% (B14);

(3) expenses incurred for processing fee (B36);

(4) stamp duties at RM630 (B28);

(5) relevant assessments (B32–B34);

(6) all quit rents (B29–B31);

H (7) proven costs of RM300 to experts (B35); and

(8) legal fees RM1,276 (B28).

For this action, I ordered cost against the defendant. The counterclaim of the defendant was dismissed.

I *Application allowed.*

Reported by CK Ong